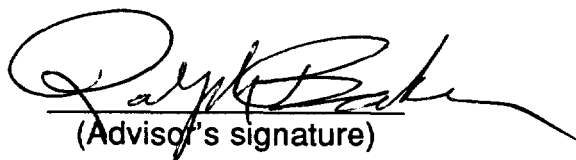


**THE EVOLUTION OF A LIVING CONSTITUTION:
A STUDY OF LEGAL REALISM IN CONSTITUTIONAL INTERPRETATION**

An Honors Thesis (ID 499)
by

Heather Lee Harrison

Thesis Director



(Advisor's signature)

Ball State University
Muncie, Indiana

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a combination of several styles, making the house unique and adaptable to desires for change. After the framework is made for the present and future governing of a new nation, there are many details associated with a constantly changing society which can be added to the framework and which make a questioning of it almost inevitable.

This framework, which governs the entire nation, totals only fifteen book-size pages. This is hard to imagine when you figure that a private contract, such as a labor contract, may be comprised of a hundred or more pages in which every trivial detail is mentioned.

Why is it that the document intended to form a “perfect union, establish justice and insure domestic tranquility, etc.,” is so brief and ambiguous? The answer to this question, no one knows for sure. The intelligent men who wrote it are not here to answer, and if they were, we would most likely get a variety of responses, each one probably just as vague as the Constitution is itself. The fact that there is no solid reason as to why the Constitution is so ambiguous has opened the door to numerous theories on how its eighteenth-century words ought to be interpreted.

Since the Constitution does not contain a set of rules on how it is to be construed and does not mention who is to be its ultimate interpreter, we are left with two important questions: Should the Constitution be open to various, changing interpretations? And who should do that interpreting?

I will attempt to answer these questions by saying that because the American society is one which experiences rapid change in technology, political attitude, social need and societal goals, the highest principles of law which are to govern it must evolve as society evolves, yet maintain social order and protect the fundamental values of a democratic society. These fundamental principles of law, which are embodied in our Constitution, were written in such a way as to allow this evolution of law - a “living constitution” which can continually accommodate itself to current conditions because its words are interpreted by the Supreme Court. Those interpretations give respect to basic legal principles, prior interpretations, each Justice’s conscience, and society’s present needs. The nine justices who sit on the Court are often charged with interpreting the Constitution’s vague language because the framers did not always give answers to issues raised by our ever-changing society. Therefore, the interpreters of the Constitution must adjust and develop the meaning of the document to solve the many changing problems of the American society.

By interpreting the Constitution in such a way as to attempt to solve some of the many confliction problems of American society, the Court “makes” law, case law, and a precedent is established which will endure until it is challenged again. A debate over whose job it is to make the law arises out of this practice however. Three well-known theories exist regarding the answer to this question, but before examining these theories, it is necessary to take a closer look at the origin of the judicial power claimed by the Supreme Court.

Article III of the Constitution grants federal judicial power to the Supreme Court and lower federal courts to be set up by Congress. Section 2 of Article III defines the jurisdiction of federal courts: cases and controversies of a constitutional nature, cases which involve foreign entities, ambassadors, admiralty and maritime jurisdiction, cases between two or more states, and all cases to which the United States is a party. The Supreme Court is granted original jurisdiction only in cases involving ambassadors and other foreign ministers, and in cases where the US is a party thereto. The court has appellate jurisdiction in all other federal cases.

The powers of the Supreme Court are ill-defined. As Kenneth Mott mentions in his book, *the Supreme Court and the Living Constitution*, the Constitution makes no explicit statement about the nature of the Court’s power even when a case falls within its jurisdiction. He adds that “the intent of the framers and their words failed to provide any certitude about the authority of the Court over the States and Congress” (Mott, p.4).

In an attempt to better define the powers of the Supreme Court, and to answer some of the questions left unanswered by the Constitution, Congress passed the Judiciary Act of 1789. In Section 25 of the Act, the Supreme Court is given the power, through its appellate jurisdiction, to “reverse or affirm state court decisions which had denied claims based on the federal Constitution, treaties or laws” (Mott, p.3). Although Section 25 was intended to more clearly state the Supreme Court’s judicial review powers, there was still room for debate. Since the Constitution is the supreme law of the land, and through the Judiciary Act the Supreme Court possesses sole jurisdiction over constitutional cases, it is to be assumed that the Court has the final say. Opponents of this view hold that saying the constitution is supreme is not the same as saying who is to decide what the Constitution means.

As far back as 1803, when our Constitution was less than 20 years old, the question

of who was to be the umpire in disputes over Constitutional interpretation was given an answer by Chief Justice John Marshall. In his famous case opinion, from Marbury v. Madison, Marshall endorsed the view of interpretation which assigns one branch of government the final authority for all Constitutional interpretation; with this method, the decision is final until reversed by Constitutional amendment. Marshall declared that "it is emphatically the province and the duty of the judicial department to say what the law is."

Although the Marbury decision was a very powerful and important one, it still did not firmly answer the question over interpretation. Erwin Chemerinsky, author of *Interpreting the Constitution*, believes that "Marbury simply holds that the judiciary may interpret the Constitution in deciding cases - it is one voice - and that it is not required to defer to legislative or executive interpretations" (Chemerinsky, p. 85).

Although the Supreme Court has been successful in claiming the right to be the "final arbiter" of the Constitution, the Court has often been attacked for doing so. The opponents of judicial interpretation support the counter-majoritarian argument posed by Alexander Bickel, a legal scholar. They argue that in a nation founded in democracy, non-elected judges should not be the ones to tell the rest of society what the Constitution says. But who better to interpret the age old document than the knowledgeable Court? A Supreme Court Justice would most likely be more objective than would be an elected legislator who might be tempted to decide an issue based on his region's majority stance on the subject so as to satisfy constituents and gain reelection. This is not to say that the Justices are never influenced by politics, but their seats on the Court are basically guaranteed for life, so the pressures to act as others (possibly less-educated, less informed, and strongly biased others) want them to act are lessened. The Justices are appointed to the Court after a scrutinizing investigation and interrogation by the U. S. Senate. They take an oath to safeguard the Constitution, with all the principles of government and human rights inherent in it, and they do so without losing sight of those fundamental principles, while at the same time allowing the document to "live" in the society of which it is presently a part. As Justice Thurgood Marshall agrees, "the Constitution written in the horse and buggy days must now be able to cover outer space."

Now, more than 200 years have passed since the initiation of the Constitution and the Judiciary Act, and today it is commonly accepted that judges interpret laws and that

the Supreme Court is the final arbiter of the Constitution. But how those laws are to be interpreted still remains an issue. Many theories regarding jurisprudence have developed in an attempt to realize an answer for the much-debated interpretation question.

One such theory is advanced by the analytical school of jurisprudence which uses the Deductive Model in evaluating the process of judging. The Deductive Model involves a major premise, a minor premise, and a conclusion made from those two. The major premise of any case at bar is the rule of law which applies to the issue at hand. The minor premise is the set of facts for the case. To reach a conclusion the judge applies the facts of the case to the rule of law. Here the rule of law is not flexible and cannot be overturned. If the facts of the case do not coincide with the law, the law prevails. This model holds that judges must find the laws to which the facts are applied and which decide the "fate" of the facts. If no such law counter to the facts of a certain case exists, then the scales of justice will tip totally in favor of those facts; a judge should not "make" a law to apply to the present case nor should he "alter" a law to provide a more fitting application of a set of facts to a law made by the legislature.

The analytical method does not judge the law itself, and, therefore, judges can't be criticized for their decisions - they merely apply the standing law to the facts. Opponents of this school argue that you can never totally remove human discretion from jurisprudence. They hold that discretion is used in deciding which law is the major premise, and thus, the role of the human being is still quite involved in the judicial process.

Finally, the analytical school is against any changing of the Constitution or of any individual state constitution. Members of this school believe that the principles of law written in the Constitution are etched in stone and should not change to keep up with society.

Another theory of jurisprudence argues that all law is judge-made law. This model, developed by John Chipman Gray, holds that judicial reasoning is deductive in form, but asserts that the legal rules applied to the facts of the case do not pre-exist the judicial decision. The decision is the legal rule and is arrived at by a careful and thorough evaluation of the facts presented and the judge's own interpretation of those facts. Gray declares, "the law is what the courts say it is and not what the legislature's statutes say it is, for judges have the last word in interpreting statutes. After all it is only

words that the legislature utters; it is for the courts to say what those words mean. . . and it is within the meaning declared by the courts, and with no other meaning, that they are imposed on the community as Law” (Benditt, p.84).

In addition, Gray argues that judicial precedents are not law. He sees them as “words written in the past by some judge, and it is only as currently interpreted that precedents have an impact on the community”(Benditt, p. 89).

Similar to Gray’s theory is a school of thought regarding jurisprudence which supports the theory that laws are meant to change as society changes. This is the sociological school; it emphasizes how the Constitution should be interpreted, and it assumes that judges are to make interpretations. This school was founded by Roscoe Pound, former Harvard Law School Dean who believed that law was neither natural nor analytical. Instead, Pound felt that it should be measured against the cultural environment of the particular time. In other words, he thought that judicial decisions should be made to work with what is going on at the time in the political and social environments surrounding the issue. He concentrated on the relationship between the legal system and society. He realized that law could not control a constantly changing society without satisfying basic social needs. Pound therefore advocated the broadening of legal study to include the effects of law on social life. He wanted judges to be seen as “social engineers who would keep law and life in harmonious balance.”

Pound advocates judicial participation in constitutional engineering: adjusting and developing the meaning of the Constitution to solve the changing problems of society. This flexible approach to interpretation would have been supported by John Marshall who insisted that “we must never forget that it is a constitution we are expounding. . . one intended to endure for ages to come, and , consequently, to be adapted to the various crises of human affairs.”

Pound’s school of sociological jurisprudence grew to include the concept of legal realism: a method of examining the way in which psychology and sociology affect jurisprudence and vice versa. Students of legal realism analyze the sociological and psychological effects and causes of judicial decision-making. It is an attempt to apply to law the more general ideas of pragmatism - a theory in philosophy which supports the repudiation of “dogma, artificiality, and the finality of truth” (Rumble, p.6). Of course, legal realists do not advocate the overturning of a precedent in an effort to alter the status quo and keep the laws consistent with all of society’s desires, but they do,

however, support a prudent examination of the way the present laws or traditional interpretations of the Constitution are affecting the way society functions.

There are two major theories of constitutional interpretation: interpretivism and noninterpretivism. The theory of interpretivism holds that judges should decide constitutional issues solely by discovering norms found in the text of the Constitution itself. Interpretivists view the document as a binding social contract between the people and the government of the United States. They see the Supreme Court as having final authority in interpreting this contract by enforcing precedent decisions. If the Court should come across ambiguity in its interpreting the document, interpretivists want the problem resolved according to the framers' intentions. Faced with the counter-majoritarian argument, the interpretivists argue their side by saying, as Paul Dimond notes in his book titled *The Supreme Court and Judicial Choice*, "that the ends of democracy are served because non-elected Justices do not make up their own law but merely seek out and apply the original intentions of the framers who promulgated the constitutional provisions in question - provisions which have been ratified by the people's representatives in the state legislatures" (Dimond, p.6).

The interpretivist theory is criticized because it fails to take into account problems with the Constitution we may encounter in the future - problems the framers had no idea would ever occur: "The interpretivist theory requires that the dead hand from the past limits the ability of the people to respond to today's needs and to plan for tomorrow's imperatives through legislation" (Dimond, p.6). These critics take the noninterpretivist view with regards to our Constitution. Noninterpretivists appreciate the fact that justices of the Supreme Court have a great deal of judicial choice in interpreting the hidden meanings of the Constitution and its many amendments. Alexander Bickel searched for "those fundamental values outside the personal preferences of the Justices that the Court should articulate for the nation" (Dimond, p.10). His study ended, however, with the realization that judges do, to some degree, use their own discretion in choosing which values are to be deemed fundamental in our society - after all, they are only human.

Another noninterpretivist, John Hart Ely, opposed Bickel's view in some respects. He felt the people should decide upon answers to substantive choices, such as which values are to be declared fundamental, through the democratic process. He advocated the development of "an approach to judicial enforcement. . . that is

consistent with the nation's commitment to representative democracy" (Dimond, p.10).

Thus, the legal realists could be classified as noninterpretivists because they focused their legal study on the judicial decision which they felt was influenced by psychology and sociology. Realists strongly agreed with Pound's proposal of a new method of legal study and even criticized him for failing to implement his plan. They took it upon themselves to make sociological jurisprudence a reality in the decision-making process of judges and not just a well-devised plan.

Among the realists who examined Pound's theory was Karl Llewellyn who wrote an article entitled "Some Idealism About Realism - Responding to Dean Pound" in order to restore some credit to the much criticized Pound. Llewellyn established that although realistic jurisprudence was a movement diverse in nature, he found that four important points were common to those claiming themselves to be realists:

- (1.) Insistence upon the reality of legal change and of judicial creation of law;
- (2.) The conception of law as a means for the achievement of social ends;
- (3.) An emphasis upon the rapidity of social change and the likelihood that for this reason law stands in need of constant updating; and
- (4.) A distrust of traditional legal rules and concepts insofar as they purport to describe what either courts or the people are actually doing (Rumble, p.8).

Llewellyn had a different view on constitutional interpretation. He believed that the text of the document should govern, not its authors. However, the text cannot govern unless it is interpreted. Llewellyn believes that the framers expected future generations to interpret the Constitution as best it could; this, he argued, explains the open-ended and ambiguous nature of the document

Former Supreme Court Justice Oliver Wendell Holmes is another influential member of the legal realism movement. He sees the Constitution as a representative act, and he supports the noninterpretivist theory. Justice Holmes has been noted to oppose any extreme, activist tampering with the Constitution, yet he appears willing to step beyond the judicial role in order to find new rights in the Constitution - rights which the framers could never have expected society to deal with. As Holmes wisely

stated: "when we are dealing with words which are also a constituent act, like the Constitution, . . . we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. . . . The case before us must be considered in the light of our whole experience and not merely in the light of what was said a hundred years ago. We must consider what this country has become." Holmes obviously feels that in interpreting the Constitution we are not obligated to be bound by the original intent of the framers, but he realizes the importance of history - that which tells us how and why we, as a society, are where we are today. The way that history is analyzed and evaluated, however, is left up to those who sit on the Court. In Justice Holmes' opinion, "continuity with the past is not a duty, only a necessity. . . the present has a right to govern itself so far as it can."

As the relationship between legal change and social change became more and more important to legal realists, and to other students of law also, the idea that the Constitution is a "Darwinian" document was increasingly supported by lawyers, political scientists, sociologists, judges, etc. who believed that constitutional law is an "evolving, open-ended process, a flow of decisions" (Miller, p.4). This notion relies heavily upon the willingness of judges to interpret, or reinterpret, the Constitution in modern terms. As Arthur Miller stated in his book, *Social Change and Fundamental Law*, "the Constitution of 1787, with its few amendments, must remain current and relevant as awesome social change alter time-honored ways of ordering public affairs" (Miller, p.12).

As could be expected, not all justices agree with activist approach to changing the law to meet up with society's needs. Justice Hugo Black's comments on judicial activism in policy-making are a prime example:

The idea is that the Constitution must be changed from time to time and that this Court is charged with the duty to make those changes. For myself, I must, with all deference, reject that philosophy. The Constitution makers knew the need for change and provided for it. Amendments suggested by the people's elected representatives can be submitted to the people or their selected agents for ratification. That method of change was good for our Fathers, and being somewhat old-fashioned, I must add that it is good enough for me. (Miller, p. 343)

His message seems to be somewhat tainted by his belief that since federal judges are

not elected, they should not initiate changes in the law, as that practice would go against the fundamental ideas of democracy - government by the people - on which our system of government was formed.

The advocates of legal change through judicial activism would probably not hesitate to rebut Black's comment. Miller sums up the argument well: "The founding fathers have been buried; they should not - indeed they cannot - rule us from their graves. We cannot look to men long dead for answers to the complex problems of human existence in an age they never contemplated" (Miller, p. 8).

Another theory in opposition to the realists' belief in activist interpretations of the Constitution is the Original Intent argument, which today is advocated by former Attorney General Edwin Meese. He feels justices should be loyal to the original intent of the framers. He points out four rules the Supreme Court should follow in keeping with the original, intended meaning of the document:

- (1.) Where the Constitutional language is specific, the Court must obey it;
- (2.) Where there was consensus among the framers regarding a principle value in the Constitution, whether it be expressed or implied, the Court must follow it;
- (3.) Ambiguous principles must be interpreted in a manner consistent with the rest of the Constitution;
- (4.) The Court must focus on the words and not the spirit of the Constitution

By following these rules, Meese argued that the justices' interpretations of the Constitution would not be as susceptible to criticism for being a purely political document.

Counter to Meese's argument is Justice Brennan's belief that almost every decision made by the Court is a political one because just as the Justices have an obligation to uphold the Constitution they also have an obligation to the American conscience - a duty to meet the social needs of our culture that only the Supreme Court can satisfy. He saw a need to get away from interpretations of the Constitution when it was new (when men could be owned as property, and when women could not yet vote) to interpretations which take into consideration the changes society has made. Interpretations of words written in 1789 when put together with behaviors and lifestyles of 1989 will produce restricting decisions and, in Justice Brennan's opinion,

“preservation of a pre-existing society.” While announcing that he respects the original intent of the framers, Brennan stresses that he will seriously take into account the ideals and behaviors of society today in order to accomplish his goal of interpreting the Constitution to promote equality and protect individual integrity in this society where increasing government participation in the economy gives rise to problems between individuals and government which the Supreme Court is charged with resolving.

As society progresses, the many changes in technology, the economy, the social structure, etc. place big demands on our legal system. Therefore, that system must be aware of those changes and allow for society's progression. It must accept a living Constitution which exists among the complex society of which it is a part: “the Supreme Court is attentive to, if not always in concert with, its political milieu, as it has used judicial review to breathe life into the Constitution” (Mott, p. 251).

The United States Constitution has in fact been “living.” Since its ratification, the Constitution has been amended 26 times, precedents have been overturned, new rights have been recognized, and existing rights have been restricted. In 1857, Chief Justice Roger Taney held in his opinion in Dred Scott v. Sanford that “Negroes are not and cannot be citizens in the meaning of the Constitution,” and in effect he held that denying slave owners of their slaves would be denying citizens of their Constitutional rights to own property. But in 1866, Congress passed a civil rights act - later to become the 14th Amendment - which declares that “all persons born or naturalized in the US are citizens of the United States and of the State wherein they reside,” and “no state can make any laws which would abridge the privileges or immunities of citizens of the United States or any person of life, liberty, or property without due process or equal protection of the laws.”

In a 1965 case involving the constitutionality of a state statute which regulated the use of contraceptives, Justice Douglas held that not all rights protected by the Constitution are specifically stated therein. He deemed the right to privacy, specifically sexual privacy, as one of these penumbral rights. (Griswold v. Connecticut) This newfound right to privacy was then expanded in 1973 with Roe v. Wade to include a woman's right to decide whether or not to terminate her pregnancy. Justice Blackmun, writing the opinion for the Warren Court, held that state statutes outlawing abortions were in violation of an individual's inherent right to privacy guaranteed, although implied, in the Constitution. Yet in 1989 the Rehnquist Court all but overturned Roe by

holding in Reproductive Health Services v. Webster that the decision whether to regulate abortions and how to regulate abortions ought to be left up to the States once again. . . . meanwhile, hundreds of thousands of pro-choicers and hundred of thousands of anti-abortionists marched down the streets of Washington D.C. to voice their opinions and hopefully influence the Supreme Court Justices.

The social and political environments surrounding controversies such as that involved in Roe have undoubtedly had some type of influence on the Court. The justices know what's going on outside of the marble palace. They realize the high degree of salience certain issues hold, and they sometimes see a need to reconsider an earlier product of judicial activism to keep up with the evolution of modern society.

The concept of a living, evolving Constitution needs to exist in a society whose culture involves rapid social change. Although we may not be totally satisfied with the idea of reshaping the many molds that are always being thrown into the kiln by our ever-changing society, we must agree to live with it because society will never cease to develop new molds, and the need for law and order will never cease. We must view the Constitution as a blueprint - a basic plan designed before construction begins, which is intended to guide builders as they erect the framework and provide future generations with a tangible and legitimate source of reference. The original blueprint will never change, even if an addition is built on to provide accommodations for new people, new ideas, or new values. It remains, however, that those additions must be in congruence with the original planner's designs, lest the whole structure fall to the ground. Only by examining the blueprint - our Constitution - through the eyes of twentieth century America, and by allowing certain changes in its designs, can we ensure the preservation of our fundamental constitutional values while at the same time permitting this great country to prosper through innovation, independence, and individuality.

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